Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

Maxine Rose,

Petitioner,

v.

State of Oklahoma,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Tenth Circuit

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MAXINE R. ROSE, Petitioner,	)	
	)	CIV-05-308-F
v.	)	
MILLICENT NEWTON-EMBRY, Warden,	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, has filed this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Petitioner is challenging the convictions for Arson in the First Degree and Endangerment to Human Life by Commission of Arson in the First Degree entered against her following a jury trial in the District Court of Cleveland County, Case No. CF-2000-200, for which she is serving concurrent sentences of twenty years of imprisonment and ten years of imprisonment, respectively. Respondent has moved to dismiss the Petition on the ground that it is barred by the statute of limitations prescribed in 28 U.S.C. §2244(d)(1), to which Petitioner has responded. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(1)(B). For the following reasons, it is recommended that Respondent's Motion to Dismiss be granted and the Petition be dismissed as untimely. According to the record presented by the parties,[1] Petitioner was convicted of the

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1 Although Petitioner is represented by counsel, Petitioner has not presented copies of the state court trial, appellate, or post-conviction records relevant to her Petition

offenses charged in Case No. CF-2000-200 and sentenced on February 20, 2002. The docket sheet in the criminal case reflects that Petitioner was represented at trial by attorney Jim Hughes. However, following the trial Petitioner's present counsel entered an appearance in the state court criminal case on October 11, 2001, and has represented Petitioner in all postconviction matters since that date. Respondent's Brief in Support of Motion to Dismiss, Ex. C. Petitioner appealed the convictions, and in a summary opinion entered March 25, 2003, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed the convictions. Id., Ex. B. With respect to the claims raised by Petitioner in his direct appeal, the OCCA found that Petitioner's convictions do not violate the statutory double jeopardy prohibition in Okla. Stat. tit. 21, §11, that there was sufficient evidence presented at trial to support the convictions, and that Petitioner was not denied effective assistance of trial counsel based on trial counsel's failure to call available alibi witnesses. Id.

Over a year later, on April 2, 2004, Petitioner filed an application for post-conviction relief in the trial court. Id., Ex. C. An evidentiary hearing was conducted on the application on August 4, 2004, and the trial court entered an order denying post-conviction relief. Id. Petitioner was subsequently granted leave to appeal the post-conviction decision out of time, and the OCCA entered an order on December 3, 2004, affirming the district court's decision denying post-conviction relief. Id., Exs. D, E, and F. In the appellate court's order, the court specifically found that the issue raised by Petitioner in the post-conviction application "of ineffective assistance of counsel for failure of counsel to call available alibi witnesses was raised on direct appeal." Id., Ex. F. Because the claim had previously been raised and rejected in Petitioner's direct appeal, the OCCA found the claim was barred from postconviction review by the

doctrine of *res judicata.* Id. With respect to Petitioner's second claim asserted in the post-conviction application that "[n]ew evidence eliminates any confidence in the outcome of the original trial result," the OCCA found that Petitioner had not shown she was entitled to any relief based on the record presented to the court. Id.

Effective April 24, 1996, the statutes governing federal habeas corpus actions for state and federal prisoners were substantially amended by the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.No. 104-132, 110 Stat. 1214. The AEDPA amends 28 U.S.C. §2244 by adding a one-year period of limitations on the filing of a petition seeking a writ of habeas corpus by a person in custody pursuant to a state court judgment. 28 U.S.C. §2244(d)(1). Petitioner filed this Petition on March 18, 2005, and his Petition is therefore governed by the AEDPA's amendments. See Lindh v. Murphy, 521 U.S. 320, 336 (1997)(AEDPA's amendments apply to habeas petitions filed after the AEDPA's effective date of April 24, 1996). Under 28 U.S.C. §2244(d)(1)(A), the one-year limitations period begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[2] Taking judicial notice of official state court records, Petitioner's convictions in Case No. CF-2000-200 were affirmed by the OCCA on March 25, 2003, and her convictions became "final" for purposes of determining the one year limitations period under 28 U.S.C. §2244(d)(1)(A) on June 25, 2003, when the time for Petitioner to seek certiorari review from the OCCA's decision to the United States Supreme Court

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[2]None of the alternative circumstances described in §2244(d)(1) for commencement of the limitations period are applicable to the instant Petition.

expired.[3] Locke v. Saffle, 37 F.3d 1269, 1272 (10th Cir. 2001)("Under the statute, a petitioner's conviction is not final and the one-year limitations period for filing a federal habeas petition does not begin to run until ...'after the United States Supreme Court has denied review, or, if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed.'")(quoting Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 1999)); accord, United States v. Burch, 202 F.3d 1274, 1279 (10th Cir. 2000)(§2255). Petitioner therefore had one year from June 25, 2003, to file her federal habeas petition commensurate with 28 U.S.C. §2244(d)(1). Accordingly, in the absence of any statutory or equitable tolling of the limitations period, the one-year limitations period would have expired on June 25, 2004.

The §2244(d) limitations period is tolled for "[t]he time during which a properly filed application for State post-conviction relief ... is pending." 28 U.S.C. §2244(d)(2). Petitioner filed an application for post-conviction relief in the state district court on April 2, 2004, and the post-conviction application was pending in the state courts until December 3, 2004, when the OCCA affirmed the district court's denial of post-conviction relief.

As of the date that Petitioner filed his state court post-conviction application, 282 days of the one-year limitations period had passed. The one-year limitations period began again on December 4, 2004, and the limitations period expired on February 24, 2005. Petitioner filed the instant Petition on March 18, 2005, some three weeks after the statute of limitations

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[3] See Rule 13.1, Rules of the Supreme Court (applicant for certiorari has 90 days from date of judgment to file petition for writ of certiorari).

period expired. In the absence of any equitable tolling of the limitations period, Petitioner's Petition is barred from judicial review by the expiration of the 28 U.S.C. §2244(d)(1) limitations period.

In this circuit, the §2244(d)(1) limitations period "may be subject to equitable tolling." Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, 525 U.S. 891 (1998). In Miller, the circuit court contemplated that extraordinary circumstances, *i.e.*, "a constitutional violation [that] has resulted in the conviction of one who is actually innocent or incompetent," may warrant equitable tolling of the §2244(d)(1) limitation period. Id. at 978. Equitable tolling is appropriate, for instance, "when a prisoner is actually innocent" or "when an adversary's conduct - - or other uncontrollable circumstances - - prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period" but is not appropriate in circumstances amounting to "excusable neglect." Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000). The Tenth Circuit has also recognized that §2244(d)(1) "requires inmates to diligently pursue claims" in state and federal courts. Miller, 141 F.3d at 978. Accord, Gibson, 232 F.3d at 808.

In a responsive brief that is not supported by any evidentiary documents, Petitioner contends the one-year limitations period should be equitably tolled because her counsel had difficulty ascertaining the whereabouts of two potential witnesses, Tara Potts and Leslie Jones, and did not obtain affidavits from these potential witnesses until March 2004. Petitioner has not provided the affidavits of these potential witnesses purportedly obtained to support the Petition. In her response, Petitioner alleges that Ms. Potts states in her affidavit that she "heard Mr. Rose [who is Petitioner's ex-husband] tell another inmate at the Cleveland County Jail that

he burned down the house in which he was residing to 'frame' [Petitioner] and thereby gain custody of his children." Petitioner's Response, at 4. With respect to the potential witness Leslie Jones, Petitioner's allegations are not clear. Apparently, however, in Ms. Jones' affidavit she states that she was present at the Petitioner's trial and would have testified that Petitioner had planned a trip to Dallas on the day of the fire that burned Petitioner's ex-husband's house and that, contrary to the prosecution's theory that she went to Dallas to escape apprehension, Petitioner had planned this trip to Dallas several weeks before the fire in order to take her son to a medical appointment. Petitioner asserts that both of these affidavits support her claim of ineffective assistance of trial counsel.

Petitioner's assertion that the affidavit of Ms. Jones provides "new" evidence not known at the time of her direct appeal is contrary to the record. In the Petitioner's direct appeal, Petitioner asserted a claim of ineffective assistance of trial counsel based on trial counsel's failure to call alibi witnesses. This claim was denied on its merits. The district court and the OCCA both found that Petitioner's claim asserted in her post-conviction application of ineffective assistance of trial counsel based on counsel's failure to call Ms. Jones and another potential alibi witness, Mr. Ruesewald, to testify at her trial was barred by the doctrine of *res judicata* because the same claim had been rejected in her direct appeal. Thus, Petitioner's argument for equitable tolling based on the "new" evidence contained in Ms. Jones' affidavit is not persuasive.

As to the purported affidavit by potential witness Tara Potts, the district court entered written factual findings and conclusions in Petitioner's post-conviction proceeding following a hearing. These findings are set forth in an order available to the public on the internet, of which the undersigned takes judicial notice. In this order, the district court found in

SUPPLEMENTAL APPENDIX

Petitioner's post-conviction proceeding that potential witness Potts'

> proposed testimony was not available at trial [and] was not known to appellate counsel at the time of appeal. [H]er testimony is new evidence, but that this is not evidence which, if presented to the jury, would have prevented the guilty verdict. It is evidence that would have contradicted or impeached the states' [sic] witnesses. At best, Ms. Potts' testimony would have been considered by the jury in determining what weight [and] credit to give to prosecuting testimony, [and] could have been itself fully explored by cross examination.

<www.oscn.net> (docket sheet in State of Oklahoma v. Maxine Rose, Case No. CF-2000-200)(Order entered August 4, 2004, by District Judge William Hetherington). The OCCA affirmed the district court's decision, finding specifically that this "[n]ew evidence" did not entitle Petitioner to post-conviction relief. Petitioner contends that she is entitled to equitable tolling of the limitations period because she is actually innocent. The actual innocence exception was developed with respect to judicially-recognized restrictions placed on a habeas petitioner's ability to file successive or procedurally defaulted federal habeas petitions. See Sclup [sic] v. Delo, 513 U.S. 298, 318-321 (1995). Under the procedural default doctrine, federal courts refuse to review the merits of procedurally-defaulted claims except in limited circumstances in which the petitioner can show cause for the default and resulting prejudice. See Murray v. Carrier, 477 U.S. 478 (1986). A distinct exception to the procedural default doctrine has been judiciallyrecognized for those habeas cases in which the petitioners can show they are

actually innocent of the offenses for which they were convicted. Thus, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Id. at 496. This "extremely rare" exception was developed in order to prevent a "fundamental miscarriage of justice" in which a "constitutional error has resulted in the conviction of an innocent person." Schlup, 513 U.S. at 324.

The standard of proof governing the actual innocence exception is high. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - - that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." Id. at 324. "The meaning of actual innocence ... does not merely require a showing that a reasonable doubt exists in light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." Id. at 329. Courts have extended the actual innocence exception to the statute of limitations arena "[b]ecause AEDPA's one-year limitations period protects the same values of comity and finality as do the procedural limits on successive and defaulted petitions." Doe v. Menefee, 391 F.3d 147, 161 (2nd Cir. 2004).

"Actual innocence has been recognized by this circuit as equitable grounds for not applying the AEDPA period of limitation ... [It] requires a showing that there is new evidence, not present in the trial, that makes it 'more likely than not that no reasonable juror' would have convicted the petitioner." Whitebird v. Snider, No. 01-6107, 2001 WL 1345095 (10th Cir. Nov. 1, 2001)(unpublished op.)(quoting Schlup, 513 U.S. at

327). See also Reynolds v. Hines, No. 02-7043, 2003 WL 170678 (10th Cir. Jan. 27, 2003)(unpublished op.)(applying Schlup standard of proof to actual innocence claim asserted as a basis for equitably tolling the §2244(d)(1) limitations period). In Whitebird, the Tenth Circuit concluded that the petitioner had not shown adequate grounds for waiving the limitations period. The petitioner had presented "new evidence consist[ing] solely of the affidavits of Whitebird himself and Larry Taylor, who pled guilty to armed robbery based on the same events and who averred that Whitebird was not involved in the robbery in question." Whitebird, 2001 WL 1345095, at *2.

Petitioner has not presented reliable evidence of her actual innocence to justify equitably tolling the limitations period. Even assuming the truth of her allegations with respect to the substance of Potts' affidavit, this evidence, had it been admitted at Petitioner's trial, might have impeached the credibility of one or more of the prosecution's witnesses. However, it is not "exculpatory scientific evidence, trustworthy eyewitness accounts, ... critical physical evidence," or similar evidence that affirmatively demonstrates Petitioner's innocence. Schlup, 513 U.S. at 324.

Because Petitioner has not shown actual innocence, her allegations of due diligence are not sufficient to excuse the limitations bar. Moreover, Petitioner's allegations of due diligence are conclusory. Petitioner does not allege what steps she took to find Potts. She alleges only that Potts' purported testimony was not known until April 4, 2003, when Petitioner's mother "disclosed names and contact information of two persons that possessed pertinent information" in Petitioner's criminal case to Petitioner's counsel. Petitioner's Response, at 8. Petitioner does not allege what steps she took prior to this date to investigate the possibility that this witness had relevant information, particularly since she alleges the information came

from her own mother. Nor does Petitioner allege in any detail what steps she or her attorney took after learning of this information. Petitioner alleges only that the potential witness had changed her name, and that it took her counsel a year to find Ms. Potts.

Because Petitioner has not shown actual innocence or due diligence, the statute of limitations should not be equitably extended beyond the expiration date. Accordingly, Respondent's Motion to Dismiss the Petition on the ground that the Petition is untimely should be granted, and the Petition should be dismissed on this basis

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RECOMMENDATION

Based on the foregoing findings, it is recommended that Respondent's Motion to Dismiss Petition for Habeas Corpus as Time-Barred (Doc. #10) be GRANTED and the Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 be DISMISSED as untimely. Petitioner is advised of her right to file an objection to this Report and Recommendation with the Clerk of this Court by June 27th , 2005, in accordance with 28 U.S.C. §636 and LCvR 72.1. The Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives her right to appellate review of both factual and legal issues contained herein. Moore v. United States of America, 950 F.2d 656(10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 6th day of June , 2005.

S/ Gary M. Purcell
GARY M. PURCELL
UNITED STATES MAGISTRATE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MAXINE R. ROSE,)
Petitioner,)
)
v.) **CaseNo. CIV-05-308-F**
)
STATE OF OKLAHOMA,)
Respondent.)

PETITIONER'S OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION

COMES NOW, Maxine Rose, by and through her attorney of record, William H. Campbell, and presents to the Court her objections to the report and recommendation of the Magistrate, Gary Purcell, previously assigned to this matter. In support of these objections the Petitioner states to the Court as follows:

1. The Petitioner has included herewith as Exhibit A the State Court record, which demonstrates the veracity of her position regarding the failure of her trial counsel to offer any witnesses on her behalf at trial. (Note Exhibits are accomplished by conventional filing).

2. The Petitioner has included in the above Exhibit A, the filed copy of the affidavit of the alibi witness demonstrating her presence at a geographic location remote from the scene of the offense at the time of its commission.

3. The Petitioner has included as Exhibit B, the transcript of proceedings of the jury trial of this matter. This Exhibit demonstrates the necessity for the calling of the non-called witnesses.

4. The Petitioner has included as Exhibit C, the Post-

Conviction Relief Application which contains the affidavits of Leslie Jones and Tera Potts, which contradict the States flight/mens rea evidence/arguments and reveal the framing of this Petitioner, respectively.

5. The Magistrate's Report states, page 4, "Taking judicial notice of official state court records" it he finds certain dates to be significant in the filing of this matter. However, it is noted in this objection that the Magistrate does not state the nature of the state court records which are judicially noticed, it is asserted, therefore, that the Magistrate should have taken judicial notice of the entire state court record, not a part to the exclusion of the remainder. In the same place the court would have found the records which reflect the date of the pleadings, it would have also found filed therein the originals of the affidavits which raise the factual innocence of this Petitioner. The Magistrate's Report acknowledges the Tenth Circuit's holding in *Miller v. Marr*, 141 F.3d 976 (10th Cir. 1998) *cert. denied* 525 U.S. 891 (1998). It is worth noting that Miller was a case involving a voluntary plea of guilty, whereas the instant case involves a constant and continuous claim of innocence coupled with a claim of a violation of her right to effective assistance of counsel as the basis for her original conviction. This claim certainly meets the requirements set forth in *Miller,* at 897, which states, in part,:

There may be circumstances where the limitation period at least raises serious constitutional questions and possibly renders the habeas remedy inadequate and ineffective. Cf. *Treistman v. United States* , 124 F.3d 361, 373-380 (2d Cir. 1997) (§ 2255). **After considering the claims Mr. Miller desires to raise, however, we are satisfied that such circumstances are not implicated here. It must be remembered that § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling**. See Calderon v. United States District Court,

128 F.3d 1283, 1287-88 (9th Cir. 1997), cert. denied , 118 S. Ct. 899 (1998). Moreover, Mr. Miller does not contend, for example, that a constitutional violation has resulted in the conviction of one who is actually innocent or incompetent. See Schlup v. Delo, 513 U.S. 298, 324-29 (1995); Cooper v. Oklahoma , 517 U.S. 348 , 116 S. Ct. 1373, 1376-77 (1996). The one-year time period begins to run in accordance with individual circumstances that could reasonably affect the availability of the remedy, see 28 U.S.C. §2244(d)(1)(B)-(D); see also Calderon , 128 F.3d at 1289 (limitation period tolled for extraordinary circumstances over which inmate had no control), but requires inmates to dillegently pursue claims.

The Petitioner has implacated both Constitutional and actual innocence issues in her Application. It is no insignificant fact that this Petitioner has continuously attempted to obtain relief from her wrongful conviction. Nor that she has never made any assertion which could be construed, even remotely, as an admission of guilt. The Magistrate's Report appears to equate "diligent pursuit" only with the filing of a document in a court clerk's office. In this case the Petitioner explained that she was attempting to locate the witness Tera Potts. Ms. Potts at the time of the Petitioner's search for her, was undergoing an apparently bitter divorce action and intentionally made herself difficult to locate. This witness was a necessary witness for the filing of the post-conviction application in the state courts. It made no sense then or now to merely re-iterate the same issues which had been denied by the state courts. This was an especially salient point considering the fact that it was believed that if this witness could be found she would provide a statement which directly placed the guilt of this Petitioner in serious doubt, thereby further supporting this Petitioner's claim of actual innocence. The Petitioner is required to bring all of the issues in a single

claim. The fact that this witness was not available was through no control, effort or desire of this Petitioner. Indeed, the contrary was true, the longer it took to find this person the longer the Petitioner would stay in prison for a crime which she did not commit.

The Magistrate states at page 8, "The standard of proof governing actual innocence exception is high. "To be credible, such a claim requires petitioner to support his claim of constitutional error with new reliable evidence - - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - - that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful."" (Citation omitted.) However, this is exactly one of those rare cases. One witness **not presented at the time of trial** places the Petitioner many miles from the scene of the crime at the time of its commission. Another witness **not presented at the time of trial** directly contradicts the emotional state on which the prosecution based its argument of proof of its circumstantial case. The third witness **not presented at the time of trial** states that the "victim" was bragging about having set up his ex-wife for the burning of his own home.

As to the third witness the Magistrate relegates the testimony of the former law enforcement officer to that of an exculpatory statement by a co-defendant. The Magistrate states, at page 10, "Even assuming the truth of her allegations with respect to the substance of Potts' affidavit, this evidence, had it been admitted at Petitioner's trial, might have impeached the credibility of one or more of the prosecution's witnesses." The substance of this statement is that Rodney Rose stated that he framed his ex-wife (Petitioner) for the Arson of his house. To assume that is true, as the Magistrate does, it is an inescapable conclusion that one cannot be both framed and guilty. The terms

are mutually exclusive. To have admitted to such an act Rodney Rose has made a statement against penal interest and the result is more than mere impeachment.

Further it is noted that at no time during the course of the trial was there any witness testimony to the effect that Maxine Rose was seen at the house of Rodney Rose at the time fo the commission of this crime.

The recent decision of the United States Supreme Court in *Rompilla v. Beard,* ____U.S.____, 2005 U.S. Lexis 4846 (Decided June 20, 2005), states, in part, "With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation." [*22]. The Supreme Court also states, quoting the *ABA Standards for Criminal Justice 4-4.1*, "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." The Supreme Court notes that it has long referred to these as guides to what is reasonable. See, *Wiggins v. Smith,* 539 U.S. at 524, 123 S.Ct. 2527 and *Strickland v. Washington,* 466 U.S. at 688, 104 S.Ct. 2052.

The significance of *Rompilla*, and it progenitors, is the necessary investigation and use of the results to rebut the assertions of the prosecution. In the instant case, it appears that trial counsel was sought out by relevant fact witnesses to testify that this Petitioner was not guilty, that is she was **factually innocent of the crime.** Trial counsel had citizen witnesses, persons not alleged to have been involved in the crime nor persons with criminal backgrounds, but rather ordinary people. The prior Court's have held that this was impeachment only, but those rulings fail to grasp the significance of the failure of

the trial counsel to call these witnesses.

At the time of trial the prosecutor stated to the jury, "...**that evidence you heard from this witness stand is uncontradicted in any way. There has been no alibi evidence brought forward to you in this trial.**" (Exhibit B, Tr. Vol. II p. 44). The able prosecutor knew his case was completely circumstantial and admitted as much. (Ibid.). The predecessor Court's holding of mere impeachment pale when compared to the facts presented in the record. Only after he had been completely out-lawyered by the prosecution did the trial counsel begin to have a glimmer of the magnitude of his failure to represent his client fully and properly. He knew at the time of the above statement by the prosecution that he, indeed had those witnesses, but through arrogance or incompetence he did not call them. Either way, it was a clear failure to act as a reasonable lawyer in defense of his client to call known credible witnesses to the defense of his client.

If the failure of the trial counsel in the *Rompilla* case warrants a reversal and remand, (and the Supreme Court says it does) then the failure in this case is exponentially more egregious. For a defense lawyer to have evidence of the factual innocence of his client and not use it is inconceivable.

The case was appealed and the relief sought was not granted. The Petitioner learned of the possible existence of a former Cleveland County Sheriff's Deputy who might have additional pertinent information regarding her case. This person was Tera Potts. After informing counsel of the possible testimony of this person, attempts to locate her commenced. Telephone calls to numbers believed to result in contact with Tera Potts were called and messages were left. After a period of time with no response, no less than three trips were made by Petitioner's counsel to the address believed to be that of Tera Potts were made and messages on counsel's business cards were

left in the entry door and secured so as to be seen upon the arrival of anyone. This resulted in subsequent telephone contact from Tera Potts. The circumstance was explained and agreed to meet with counsel and discuss her knowledge of the case. Again she dis-appeared. More time was consumed trying to relocateher. Finally, she was located and a discussion of her knowledge was finally accomplished. She agreed to review and sign an affidavit, which was done at her attorney's office. The Petitioner then filed her Post-Conviction Application. It also took some time to locate Leslie Jones, however, she was not as difficult as was the finding of Tera Potts. At the time of the original appeal the only witness who had continued to be readily available was Ted Ruesewald. Appellate counsel had not talked to any potential trial witness at the time of the appeal, except him. Appellate counsel, therefore, did not personally know what the testimony of these other witnesses would have been until after the direct appeal was concluded. Though Leslie Jones is referenced as one of the potential trial witnesses at the time of the direct appeal she had not been interviewed and counsel relied on the client's accurate and correct description of what that testimony would have been. This is recounted due to some confusion which appears in the discussion of what constitutes original appeal matters and what is new evidence. To the extent that appellate counsel had not confirmed the testimony of Leslie Jones until after the time of the direct appeal and could be recounted with specificity it was treated generally in the direct appeal and then raised again with the specificity in the Post-Conviction proceedings.

The Petitioner has shown:

a. She has demonstrated that had her trial counsel called the available witnesses to her defense, more likely than not no reasonable juror would have convicted her.

b. She has consistently maintained her innocence of the charges and has to the best of her ability diligently sought to vindicate herself and to find the additional evidence which would help accomplish that acquittal.

c. She has obtained credible evidence in the testimony of a former law enforcement officer that the alleged victim of this crime bragged of having framed his ex-wife [the Petitioner] for this crime.

d. The fact that trial counsel abdicated his duty to defend his client with the favorable evidence at his disposal is sufficient to seriously raise the ineffective assistance of counsel issue, as well as, the denial of her right to substantive due process and her right to a fair trial which all flow from his failures.

e. Taking any of the foregoing factors individually is sufficiently serious to undermine the confidence in the outcome of the trial and considered in the aggregate are well beyond any reasonable standard for the granting of the Petitioner's relief by this Court.

Wherefore, the foregoing premises considered the Petitioner objects to the Report and Recommendation of the Magistrate and prays this Court permit her to proceed with her cause of action to extricate herself from her wrongful conviction and incarceration.

Respectfully Submitted,

S/ *William H. Campbell*

William H. Campbell OBA1454

SUPPLEMENTAL APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2005, I electronically transmitted the attached document to the Clerk of the Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants: Office of the Attorney General of Oklahoma.

S/ William H. Campbell